

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

COLTON ANDREW WATTS,

Appellant.

No. 39016-7-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury entered verdicts finding Colton Watts guilty of delivery of a controlled substance, ecstasy, and guilty of involving a minor in drug dealing. Watts appeals his convictions, asserting that the trial court erred by refusing to excuse a juror who expressed concerns about serving on the jury. Watts also asserts that the trial court erred by requiring him to post two separate bonds before it would release him from custody pending his appeal. We affirm.

**FACTS**

On May 9, 2008, in Vader, Washington, the Lewis County Sheriff's office performed a controlled buy of 3,4-methylenedioxymethamphetamine, also known as ecstasy, from Watts, through its informant, Jase Mendez. When Mendez came to Watts's home to buy the ecstasy, Watts instructed 16-year-old Cameron Poole to go outside and give Mendez 17 pills of ecstasy

and to collect the money from him. The State charged Watts with delivery of a controlled substance, contrary to RCW 69.50.401, and involving a minor in drug dealing, contrary to RCW 69.50.4015.

A jury trial began on January 13, 2009. During a break in the trial, a juror indicated that she might have issues with serving on the jury:

THE COURT: . . . The bailiff informed me that you have an issue with respect to this trial?

JUROR: Yes, I do.

THE COURT: What's the issue?

JUROR: Well, I'm very familiar with Vader and some of the names that you called in court. I did not recognize, but listening to the names again, yes, I do know some of these people, so I'd like to be excused.

THE COURT: The mere fact that you know some of these people, that causes you to believe you'd have a hard time sitting as a fair and impartial juror in the case?

JUROR: Yeah, it would bother me.

THE COURT: Do you know some of the names of these people that the detective talked about in his testimony, and do you know them well?

JUROR: No.

THE COURT: Of course, I realize Vader is a small community.

JUROR: Uh-huh.

THE COURT: Do you know any of them on a personal or social basis?

JUROR: No.

THE COURT: Okay. Are you uncomfortable -- do you live in the Vader area?

JUROR: Yes.

THE COURT: Are you uncomfortable sitting as a juror in this cause because of the fact that there's [sic] people involved in the Vader community the detective is describing? Do you feel apprehensive about that[,] the fact you're being asked to sit in judgment of some action and there may be perhaps some retaliation or something of that sort?

JUROR: Yes.

THE COURT: Is it very concerning to you?

JUROR: Uh-huh.

THE COURT: Would you like to inquire?

[The State]: Can you tell us which names?

JUROR: No.

[The State]: I have no other questions.

THE COURT: [Defense counsel]?

[Defense counsel]: Well, probably everybody on the jury is going to feel imitated [sic] by passing judgment on somebody else. I don't know that this juror could put aside her feelings and judge the evidence on the facts.

THE COURT: Ma'am, are you able to put aside whatever feelings you may have and the fact that you may know some of the names and -- and judge the case on the evidence as it's presented?

JUROR: Yes.

.....

THE COURT: I'm going to leave you on the jury at this point.

Report of Proceedings (RP) (Jan. 13, 2009) at 31-33.

The State requested that the trial court excuse the juror and Watts's defense counsel argued against the State's request, asserting that the juror indicated she could be fair and impartial. The trial court brought the juror back in to answer some additional questions:

[THE COURT:] As I understand it, your initial concern, with respect to service on this jury, arose during the course of your listening to Detective Engelbertson's testimony; is that correct?

JUROR: Uh-huh.

THE COURT: And what triggered it was his mention of some -- of at least one individual about whom you're concerned that you may know who lives in the Vader area?

JUROR: Just -- just knowing the Vader area in general and -- and coming in contact with these people and, you know, it's -- I just feel uncomfortable.

THE COURT: Are you -- are you concerned that there -- in the event that you were to continue to serve on a jury, knowing this particular individual, that there might be retribution to follow in the event there were a conviction?

JUROR: Not really, but I'm just hoping that I can be impartial.

THE COURT: Okay. Who specifically -- what specific name was it that raises your concern?

JUROR: Maybe it's not so much names as it is vicinity, the area, because I know a lot of people down there.

THE COURT: I see. Are you telling me you would have some difficulty being fair and impartial because of the fact that the entire transaction about on which the State basis [sic] the prosecution occurred in the Vader area?

JUROR: I'm just worried somewhere during the trial it could create a problem, so I wanted to bring it forth early.

THE COURT: So it isn't specifically one individual that Detective

Engelbertson mentioned. It's more of the fact the transaction occurred in Vader and nobody told you that during the jury selection?

JUROR: Yes.

THE COURT: Do you think you could put aside any concern and actually judge the case on the evidence as presented, or would you prefer that the Court excuse you from further attendance and participation?

JUROR: I would prefer the Court excuse me, if that's possible.

THE COURT: Counsel?

[The State]: The State has no questions. Our concern was it may have been a particular person. What I hear her saying is that's not the case.

[Defense counsel]: And although she didn't -- you asked her a two-part question, can you judge the case impartially, or would you rather be excused, and she says, I would rather be excused. She had previously answered -- and I think I'm correctly stating it -- that she could set aside feelings and judge the case impartially based on the evidence. If that's still her position, I'm not submitting that she should be excused.

THE COURT: Is that still your position?

JUROR: Yes.

THE COURT: Okay.

JUROR: I just didn't know if anything would develop further into the case, and then it would cause a setback.

RP (Jan. 13, 2009) at 41-43. The trial court determined that the juror should stay on the jury but told her to tell the bailiff if she had any additional issues during the course of the trial.

The jury returned guilty verdicts on both counts and the trial court sentenced Watts within the standard range. After sentencing Watts, the trial court set an appeal bond for \$50,000 and required Watts to post his appeal bond with two sureties. Watts filed a motion contesting the trial court's determination that he was required to post two separate surety bonds before it would release him from custody pending his appeal. At the March 9, 2009 hearing on Watts's motion, the trial court ruled that it did not have authority to lift the two-surety bond requirement. Watts timely appeals his conviction and the trial court's appeal bond order.

ANALYSIS

Impartial Jury

Watts first contends that the trial court abused its discretion by refusing a juror's request that it excuse her from the jury, arguing that the trial court's decision violated his right to a fair and impartial jury under the State and Federal Constitutions. We disagree.

The Sixth Amendment of the Federal Constitution and article I, section 22, of the Washington Constitution guarantee every criminal defendant the right to a fair and impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983) (citing *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)). At trial, Watts did not object to the trial court's decision not to excuse the juror and expressed a desire that she be retained so long as she believed she could be fair. Nevertheless, a trial court has a continuous obligation to excuse any juror who is unfit and unable to perform the duties of a juror. *State v. Jordan*, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001). RCW 2.36.110 provides:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Additionally, CrR 6.5 mandates in part that, "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." Because the trial court is in the best position to determine a juror's ability to be fair and impartial, we will not disturb a trial court's decision whether to excuse a juror absent an abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991); *Hough v. Stockbridge*, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009) (citing *State v. Depaz*, 165 Wn.2d

842, 858, 204 P.3d 217 (2009)). A trial court abuses its discretion if it bases its decision on untenable grounds or for untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court is not required to excuse a juror who expresses concerns about serving on the jury if the juror indicates that she can put her concerns aside to decide the case based on the evidence given at the trial and by applying the law provided by the court. *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988).

As an initial matter, we need not address the merits of Watts's contention because Watts invited any error resulting from the trial court's refusal to excuse the juror at issue by opposing the State's request to excuse the juror. The invited error doctrine precludes a party from setting up an error at trial and then complaining of it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). By objecting to the State's request to excuse the juror, Watts invited any error flowing from the trial court's decision to leave her on the jury.

Moreover, even if Watts's challenge was properly preserved for review, his claim fails on the merits. Here, the juror at issue expressed concerns about serving on the jury because she was familiar with many people living in the small community where Watts allegedly committed his crimes. When questioned by the trial court and counsel, the juror stated that she did not recognize any particular individual connected to the case, but rather, she was asking the trial court to excuse her out of a concern that "somewhere during the trial it could create a problem, so [she] wanted to bring it forth early." RP (Jan. 13, 2009) at 42. More important, the juror indicated that she "could set aside [her] feelings and judge the case impartially based on the evidence." RP (Jan. 13, 2009) at 43. Because the juror at issue indicated that she could put her concerns aside to decide the case fairly and without bias, the trial court did not abuse its discretion by refusing to

excuse her from the jury. Accordingly, the trial court did not violate Watts's right to a trial by a fair and impartial jury by retaining the juror and we affirm.

#### Post-Conviction Bail Pending Appeal

Next, Watts contends that the trial court erred by finding that RCW 10.73.040 required it to impose two separate appeal bonds from two separate sureties in order to release Watts from custody pending this appeal.<sup>1</sup> Specifically, Watts asserts that CrR 3.2, which does not explicitly require the posting of two separate surety bonds, exclusively governs the procedure for setting post-conviction bail pending appeal. The State counters that, even if CrR 3.2 exclusively governs post-conviction bail procedures, the trial court did not abuse its discretion in requiring two separate surety bonds because CrR 3.2 gives the trial court discretion to impose multiple surety bonds. We hold that under CrR 3.2, the trial court had discretion to require Watts to post two separate surety bonds before releasing him on bail pending his appeal, but that, to the extent the trial court rested its decision on RCW 10.73.040's two-surety bond provision, it erred.

CrR 3.2(b) states in part:

If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:

.....

(5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

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<sup>1</sup> Because we cannot provide Watts with any effective relief, this issue is moot. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (“A case is moot if a court can no longer provide effective relief.”). But we nonetheless address the merits of Watts's contention because it is likely to escape review. *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994) (In determining whether to address an issue that is otherwise moot, reviewing courts may consider “the likelihood that the issue will escape review.” (quoting *Seattle v. State*, 100 Wn.2d 232, 250, 668 P.2d 1266 (1983) (Rosellini, J., dissenting))).

CrR 3.2 allows, but does not require, that trial courts impose multiple surety bonds before releasing a convicted person pending his appeal. Here, the trial court mistakenly believed that the law required multiple surety bonds under RCW 10.73.040. In ruling on Watts's request to eliminate the two-surety bond requirement, the trial court stated:

THE COURT: The order should clearly reflect the reason I'm denying the request is that I don't think I have the authority to do that. If you want to include that in your appeal and perhaps make some law on the subject, that would be okay, too. I would like to see the matter resolved, find out if I do or don't have that authority.

RP (Mar. 9, 2009) at 10.

A trial court abuses its discretion when it bases its decision on an error of law. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). Thus, although the trial court here had discretion to impose two surety bonds under CrR 3.2, we address whether its stated rationale for doing so was an error of law.

RCW 10.73.040 provides in part:

In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant; and the appellant shall be committed until a bond to the state of Washington in the sum so fixed be executed on his behalf *by at least two sureties* possessing the qualifications required for sureties on appeal bonds.

(Emphasis added.)

In *State v. Smith*, 84 Wn.2d 498, 500-01, 527 P.2d 674 (1974), our Supreme Court recognized a conflict between RCW 10.73.040's requirement that trial courts set bail pending appeal "[i]n all criminal actions, except capital cases in which the proof of guilt is clear or the

presumption great” and former CrR 3.2(h) (1973), which required trial courts to set post-conviction bail ““unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community.”” In resolving this conflict, our Supreme Court first determined that convicted persons have no constitutional right to bail pending appeal. *Smith*, 84 Wn.2d 499. It then ruled that the right to bail is essentially procedural and, thus, within the province of the court rules. *Smith*, 84 Wn.2d at 502. Our Supreme Court held that to the extent former CrR 3.2(h) conflicted with the statute, RCW 10.73.040, the court rule controlled, reasoning, “[s]ince the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature.” *Smith*, 84 Wn.2d at 502. Our Supreme Court alternatively held that the legislature delegated to our Supreme Court the power to proscribe rules for bail pending appeal under RCW 2.04.190 and RCW 2.04.200.<sup>2</sup> *Smith*, 84 Wn.2d at 502.

Contrary to Watts’s contention, *Smith* only invalidated RCW 10.73.040 to the extent that it abridged or modified the post-conviction bail procedures promulgated by our Supreme Court in former CrR 3.2(h). But, because RCW 10.73.040’s two-surety bond provision restricts the trial court’s discretion to impose a bond with an amount of sureties it finds sufficient to secure the convicted person’s presence at future hearings, it conflicts with CrR 3.2. Accordingly, CrR 3.2 controls and grants a trial court discretion to impose multiple sureties but does not mandate that it do so. The trial court erred by requiring two separate surety bonds under that portion of RCW 10.73.040 in conflict with CrR 3.2.

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<sup>2</sup> RCW 2.04.200 provides:

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

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Accordingly, we affirm Watts's delivery of a controlled substance conviction and, if he remains free on appeal bond, remand for entry of the warrant committing him to the appropriate institution to serve his sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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QUINN-BRINTNALL, J.

We concur:

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BRIDGEWATER, P.J.

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HUNT, J.